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In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

- v. -

MICHAEL HARDWICK, AND JOHN AND MARY DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

AMICUS CURIAE BRIEF ON BEHALF OF THE RESPONDENTS BY LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE FOLLOWING ORGANIZATIONS: GAY AND LESBIAN ADVOCATES AND DEFENDERS; THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK; THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION; AND THE GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC.

January 31, 1986

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INTEREST OF AMICI CURIAE

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. ("LAMBDA"), appearing as *amicus curiae* with the written consent of the parties to the instant case, is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian legal organization in the country. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LAMBDA Certificate of Incorporation ¶2.2(a).

LAMBDA has appeared as counsel of record or as *amicus curiae* in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, and in cases that have challenged laws, regulations, or private actions which discriminate against or restrict the basic civil and constitutional rights of gay men and lesbians.

LAMBDA thus has a strong interest in this case, and submitted an *amicus curiae* brief to the United States Court of Appeals for the Eleventh Circuit on behalf of the respondents Michael Hardwick and John and Mary Doe. LAMBDA is particularly concerned about the far-ranging, damaging impact of statutes such as the one challenged herein, which criminalize private, consensual, adult sexual conduct and which have an especially adverse impact on lesbians and gay men.

GAY AND LESBIAN ADVOCATES AND DEFENDERS ("G.L.A.D."), incorporated in Massachusetts as Park Square Advocates, Inc., a nonprofit tax-exempt corporation, was founded to remedy the legal disabilities suffered by gay

men and lesbians and is dedicated to the abolition of restrictions on the civil rights of homosexuals in the United States. Through its written materials and public speaking, G.L.A.D. educates the lesbian and gay community, the legal community and the public at large concerning the legal problems suffered by lesbians and gay men and the remedies available for those problems. Through its public interest litigation, G.L.A.D. participates in civil and criminal cases involving lesbians and gay men who have been discriminated against on the basis of their sexual orientation and works to vindicate and expand lesbian and gay civil rights.

THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK ("ASSOCIATION") is a professional association of the legal community concerned with the rights of lesbians and gay men. The ASSOCIATION pursues its purposes through provision of legal services on a *pro bono* basis within the lesbian and gay community, educational programs, a legal newsletter, and cooperation with community organizations such as Gay Men's Health Crisis, Inc., and national legal organizations such as LAMBDA.

THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION is a state-wide organization of lesbian and gay attorneys dedicated to the fair and just treatment of lesbians and gay men under the law. Its purposes include taking action on questions of law in the administration of justice, promoting the issue of human rights, and combatting discrimination.

The GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, INC. ("ALLIANCE"), a Delaware nonprofit corporation, seeks to identify and respond to public expressions of homophobia and bigoted and misinformed statements concerning gay and lesbian people; and to se-

cure justice and fair treatment for all people, regardless of age, race, creed, profession, sex, national origin or sexual orientation. A national organization, the Alliance is headquartered in New York City and works closely with other public interest and civil rights organizations and with the media.

All of the organizations which have joined LAMBDA in this *amicus curiae* brief share with LAMBDA a deep concern about statutes such as the one challenged herein, which penalize private, adult, consensual, noncommercial sexual conduct, and thus severely impact on millions of Americans, gay and non-gay alike.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly ruled that the right to privacy embraces both the decision to engage in private sexual activity, including oral and anal sexual contact, and the choice of an adult sexual partner, including one of the same sex. The Constitution leaves such intimate personal matters of vital importance to the individual up to each person, free of unwarranted intrusion by the state. This privacy right is not confined to choices regarding procreation, and does not only protect married people.

The state's characterization of same-sex intimacy as aberrant, and therefore without constitutional protection, is false. First, intimate sexual behavior between people of the same sex is not aberrant; it is a healthy and natural expression of love and erotic interest for literally millions of people. Second, there is no social consensus that condemns same-sex activity or those who engage in it; most Americans live in jurisdictions which have eliminated criminal sanctions such as Georgia's, and most believe that the choice to engage in private sexual

activity, same-sex or otherwise, is just not the government's concern. Third, social disapproval, fear, and prejudice cannot override constitutional protection for the individual's choice of intimate association.

Before the government can regulate or penalize private sexual activity between consenting adults, it must demonstrate a compelling state interest based on a showing of real harm, and must tailor its response to minimize its interference with that fundamental right. This Court should hold the state to its constitutional obligation to show a compelling interest in support of its massive curtailment of its citizens' right to sexual privacy and intimate association.

ARGUMENT

POINT I

THE RIGHT TO PRIVACY PROTECTS THE INDIVIDUAL'S DECISION TO ENGAGE IN PRIVATE SEXUAL ACTIVITY AND TO CHOOSE A CONSENTING ADULT PARTNER, INCLUDING A PERSON OF THE SAME SEX.

The right to privacy protects each adult individual's freedom of intimate association and choice to engage in private sexual activity, including such association and activity with a partner of the same sex. *See Roberts v. United States Jaycees*, 468 U.S. —, 104 S.Ct. 3244, 3249-51 (1984). This privacy right stems from the underlying value of individual freedom, the moral context of the Constitution. It is rooted in a line of cases almost one hundred years old. *See Roe v. Wade*, 410 U.S. 113, 152 (1973). The logic of those cases makes clear that the personal decisions of adults regarding sexual activity and intimate association in the home "are essentially private and beyond the legitimate reach of a civilized society." *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir.), *cert. granted*, — U.S. —, 106 S.Ct. 342 (1985).

The state seeks, erroneously, to limit the holdings of this Court to the narrow areas of procreation and marriage. (Brief at 25). This view is too restrictive; it would read unmarried individuals out of the Constitution. Moreover, it cannot be harmonized with the cases, which reject an emphasis on procreation and rightly focus on the importance to the individual of the choices in question. It cannot be that only married people are protected by the Constitution, or that the only important decision left to one's autonomous choice in this free society is that regarding procreation. Rather, the privacy of these personal decisions and intimate associations must be respected by the state because of the significance of sexuality in adult private life, and because of what it means to be free.

The Eleventh Circuit correctly held that the Georgia statute infringes on the right to privacy. It recognized this nation's basic commitment to governmental non-intervention with personal choice. *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). The decision to engage in private sexual activity with a person of the same sex is such a choice, and must be protected as an aspect of the individual's right to privacy and freedom of intimate association.

A. The Privacy Right Protects Each Individual's Choice of Sexual Partner and Private Sexual Activity.

The "force and rationale", *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977), of this Court's privacy cases[1] require that private sexual activity between partners

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1. While the right of privacy was first denominated twenty years ago in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the concept of such an autonomy right had developed for many years prior to that case "[i]n a line of decisions . . . going back perhaps as far as *Union Pacific R.R. Co. v. Botsford* . . . (1881)." *Roe v. Wade*, 410 U.S. 113, 152 (1973).

of the same sex be protected as a fundamental right.[2] *Hardwick*, 760 F.2d at 1202; *People v. Onofre*, 51 N.Y. 2d 476, *cert. denied*, 451 U.S. 987 (1980). Those cases concern personal decisions about one's physical person and intimate association with others, and repudiate the notion that social conformity or the state's coercive power should take precedence over individual freedom in such private matters.[3]

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2. Several courts have held that the right to privacy protects private sexual conduct between consenting adults. *See State v. Saunders*, 75 N.J. 20, 381 A.2d 333 (1977); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v. Hill*, 166 N.J. Super. 224, 399 A.2d 667 (Law Div. 1978); *see also Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) ("sodomy" statute struck down on equal protection grounds; privacy issue not reached); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) *(en banc)*, *cert. petition filed*, No. 85-1225 (Jan. 18, 1986). *But see Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 90 (1976).

3. "[T]here is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to full protection as an aspect of the individual's right of privacy." *Beller v. Middendorf*, 632 F. 2d 788, 809 (9th Cir. 1980), *cert. denied sub nom. Beller v. Lehman*, 425 U.S. 905 (1981). *See, e.g.*, Bazelon, *Probing Privacy*, 12 Gonz. L. Rev. 587, 616-17 (1977); Craven, *Personhood: The Right to Be Let Alone*, 1976 Duke L.J. 699 (1976); Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L.L. Rev. 233 (1977); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 682-8 (1980); Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 Dayton L.Rev. 645 (1985); Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right To Be Let Alone*, 10 Dayton L.Rev. 705 (1985); Note, *Griswold Revisited In Light of Uplinger: An Historical and Philosophical Exposition of Implied Autonomy Rights in the Constitution*, 13 N.Y.U. Rev. L. & Soc. Change 51 (1984-85); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L.J. 957, 1014-18 (1979); Tribe, *American Constitutional Law* § 15-13 (1978 and Supp. 1979); Wilkinson & White, *Constitutional Protection for Personal Lifestyle*, 62 Cornell L. Rev. 563 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 Mich. L. Rev. 1613, 1637 (1974).

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court struck down a state attempt to restrict the sexual activity of married individuals to conduct having a procreative purpose or potential. The Court focused on the "notions of privacy surrounding the marriage relationship," and rejected "traditional" arguments, decoupling the decision to engage in sex from the decision to procreate.[4] *Id.* at 486.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), this Court made clear that the right of privacy inheres in the individual, and is not confined to the marital relationship.

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (original emphasis). Under the Constitution, states may not bar access to contraception in order to burden the private individual choice of unmarried persons to engage in sexual activity. Such a choice is properly made by the individual, not by the state. *Id.*

In *Roe v. Wade*, 410 U.S. 113, this Court linked the Constitution's prohibition of unjustified governmental infringement on the choice to engage in sexual activity with

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4. Two years later, this Court held that the government could not infringe the fundamental right to marry even to prevent a feared "corruption of blood" resulting from sexual relations between people of different races. *Loving v. Virgina*, 388 U.S. 1 (1967). As in *Griswold*, the facts in *Loving* involved a married couple, but the logic of the case was not limited to formal marital status. "In effect, the *Loving* Court held that a state may not prohibit adults from voluntarily entering into a legal relationship in which, under *Griswold*, their right of private sexual intimacy would be protected." *Miller v. Rumsfeld*, 647 F.2d 80, 84 (9th Cir. 1981) (Norris, J., dissenting from denial of rehearing *en banc*).

the individual's basic right of control over intimate decisions regarding his or her own body. The Court subsequently held that the fundamental right to engage in nonprocreative sexual activity extends even to minors. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Services International*, 431 U.S. 678; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). In so holding, this Court recognized that consideration of a privacy claim begins with an inquiry into the importance to the individual of a particular choice or conduct.

Eisenstadt and *Roe* make clear that the privacy right is not rooted in marriage or confined to issues of procreation.[5] In fact, *Griswold* demonstrates that under the Bill of Rights, sex and sexual privacy are for the individual's fulfillment, not for society's interest in procreation or family. 391 U.S. at 486 (marital relationship not just a means of reproduction, but also a "coming together . . . or way of life"). The marital association is significant not merely, indeed not even primarily, as a vehicle for reproduction, but rather, as an "opportunity for mutual support and self-expression."[6] *Hardwick*, 760 F.2d at 1212.

This opportunity, protected against state interference, is not found only in marriage or in "traditional" couplings.

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5. Furthermore, in *Kelly v. Johnson*, 425 U.S. 238, 244 (1976), while rejecting a police officer's challenge to a regulation regarding hair length, this Court made clear that the *Griswold* line of cases did not foreclose a privacy or "liberty interest" claim in other matters, such as personal appearance. The impact of the privacy cases is not confined to the factual settings of marriage, procreation, or family life. *See id.* at 249 (Powell, J., concurring); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

6. "It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection." *Lovisi v. Slayton*, 363 F. Supp. 620, 625 (E.D.Va. 1973), *aff'd on other grounds*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

The Constitution protects the family not because it fits some "traditional" conception of "the family", but because of the importance of such basic relationships to the individuals concerned. For those who choose to engage in same-sex intimacy, that choice is no less important.

The relationships gay people form as loving couples are indistinguishable from anyone else's in intimacy, aspiration, caring, support, stability, and significance.[7] Blumstein & Schwartz, *American Couples* 45 (1983) ("'Couplehood', either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."). Because "[a] mature individual's choice of an adult sexual partner, in the privacy of his or her own home, [is] a decision of the utmost private and intimate concern," *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1203 (Merhige, J., dissenting), there is no logical reason to exclude his or her personal decision from the "rational continuum," *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), of personal freedom protected by the constitutional right to privacy.

The Georgia statute is particularly offensive because it invades the sanctity of the home and permits the state to police and prevent the most intimate adult activities even when conducted in private. As this Court stated in *Stanley v. Georgia*, 394 U.S. at 565, "[w]hatever may be the justifications for [statutes regarding activity in public] we do not think they reach into the privacy of one's own home." *See*

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7. The term "homosexual" denotes people who have a sexual orientation and emotional attraction for others of the same sex. "Gay" and "lesbian" describe people who identify themselves—whether to themselves alone or, in varying degrees, to others—as having such homosexual orientation. *See* Paul and Weinrich, "Whom and What We Study," *Homosexuality: Social, Psychological and Biological Issues* 23 (Paul ed. 1982) (hereafter: *"Homosexuality"*).

also Payton v. New York, 445 U.S. 573, 589-90 (1980) (constitutional protection reaches its height when the state seeks to regulate activity in the home).

In *United States v. Orito*, 413 U.S. 139 (1973), this Court recognized that the location of activity can affect the degree of protection afforded it, regardless of whether it has been specifically identified as a protected activity. "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." *Id.* at 142 (Burger, C.J.). In particular, this Court has defended "the right to satisfy . . . emotional needs in the privacy of [one's] own home." *Stanley*, 394 U.S. at 515.

The state argues that it may prohibit same-sex intimacy as well as all oral and anal sexual contact because of its view that society condemns such activities. (Brief at 19-24, 31). This argument is wrong for two reasons. First, there is no such social consensus. For example, half the states have decriminalized private sexual activity between adults of the same sex.[8] *See* discussion in Point II.

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8. Alaska (1978 ASL § 21, ch. 166, eff. 1/1/80); California (1975 Cal. Stat., ch. 71, § 7, eff. 7/1/76); Colorado (1971 Colo. Sess. Laws, ch. 121, § 1, eff. 1/1/72); Connecticut (1969 Public Act 828, § 214, eff. 11/1/71); Delaware (58 Del. Laws, ch. 497, § 1, eff. 4/1/73); Hawaii (1972 Haw. Sess. Laws, Act 9, § 1, eff. 1/1/73); Illinois (1961 Ill. Laws, p. 1983, § 11-2, eff. 1/1/73); Indiana (1976 Ind. Act. P.L. 148, § 24, eff. 7/1/77); Iowa (1976 Ia. Acts, ch. 1245, § 520, eff. 1/1/78); Maine (1975 Me. Acts, ch. 499, § 5, eff. 5/1/76); Nebraska (1977 Neb. Laws, L.B. 38, § 328, eff. 7/1/78); New Hampshire (1973 N.H. Laws, § 532:26, eff. 11/1/73); New Jersey (1978 N.J. Laws, ch. 95, § 2C:98-2, eff. 9/1/79); New Mexico (1975 N.M. Laws, ch. 109, § 8, eff. 1/1/76); New York (law held unconstitutional on privacy and equal protection grounds, *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981)); North Dakota (1977 N.D. Sess. Laws, ch. 122, § 1, eff. 1/1/78); Ohio (1972 Ohio Laws, 134 v. H 511, § 2, eff. 1/1/74); Oregon

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Second, social disapprobation cannot override constitutional protections for individual choice. *E.g., City of Cleburne v. Cleburne Living Center*, — U.S. —, 105 S.Ct. 3249 (1985); *Palmore v. Sidoti*, — U.S. —, 104 S.Ct. 1879 (1984).

Because the choice of an intimate sexual activity or of a sexual partner is so keenly personal and important to the individual, the Constitution protects the individual's right to choose even if a majority disapproves of the decision he or she makes. *See Onofre*, 51 N.Y.2d 476; *see also* Bazelon, *Probing Privacy*, 12 Gonz. L. Rev. at 616-17. *Griswold*, *Eisenstadt*, and *Roe*, among others, all demonstrate that society's judgment that an activity is "immoral" cannot sustain a statute which interferes with protected private choices.

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds," *Stanley*, 394 U.S. at 565, including their right to choose an adult sexual partner and intimate activity that does not harm others.

> The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). More recently, this Court has stated that "our nation . . . has thrived on the principle that,

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(1971 Ore. Laws, ch. 743, § 432, eff. 1/1/72); Pennsylvania (*Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); South Dakota (1976 S.D. Sess. Laws, ch. 158, § 22-8, eff. 4/1/77); Vermont (1977 Vt. Acts, No. 51 § 3, eff. 7/1/77); Washington (1975 Wash. Laws, 1st Exec. Sess., ch. 260, eff. 6/1/76); West Virginia (1976 W. Va. Acts, ch. 43, eff. 6/1/76); Wisconsin (Wis. Stat. Ann. § 944.17, eff. 5/12/83); Wyoming (1977 Wyo. Sess. Laws, ch. 70, § 3, eff. 5/27/77).

outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

The privacy right reflects the underlying conception of the proper balance between self and society which gives meaning to the American constitutional design. It limits the extent to which government action and majority disfavor may infringe upon individual choice. The privacy right protects the individual's intimate personal choices, however popular or unpopular, unless actual social harm is shown. Thus, this Court has upheld the right to use contraception, *Griswold*, to use pornography, *Stanley*, and even to have children study a once-despised foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Surely, an adult's interest in deciding to engage in a particular sexual activity or choosing a partner is of no less significance. Unless this Court "closes [its] eyes to the basic reason why certain rights have been accorded shelter under the Fourteenth Amendment's due process clause," *Moore*, 431 U.S. at 501, and the right to privacy, it cannot escape the application of the "force and rationale" of those precedents regarding sexuality and intimate association to find that the right to privacy protects private sexual activity between adults, including such activity between adults of the same sex.

B. Millions of Americans Engage in Private Sexual Activity With Partners of the Same Sex, and That Behavior is Widely Recognized as a Natural and Healthy Expression of Intimacy.

In every respect, intimate associations between men and men and women and women reflect the precious values protected by the right to privacy, and meet the criteria de-

fining protected "intimate associations" discussed in *Roberts v. United States Jaycees*, 104 S.Ct. at 3249-51.

> [C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme . . . [, because] they . . . foster diversity[, because] individuals draw much of their emotional enrichment from close ties with others [, and because such relationships] safeguard the ability independently to define one's identity central to any concept of liberty.

Id. at 3249-50. Americans must be free to engage in constitutionally protected sexual activity with others of the same sex, if that is their desire, as it is for literally millions.

In 1948, research first demonstrated that at least ten percent of the American male population had a sexual orientation and emotional attraction for, and engaged in sexual conduct with, other men. Kinsey, Pomeroy, Martin, & Gebhard, *Sexual Behavior in the Human Male* (1948). More recent research suggests that the incidence of same-sex sexual activity has not shifted measurably since the Kinsey studies, despite changes in social attitudes and a major trend toward decriminalization of sexual activity between adults of the same sex.[9] One recent study conservatively estimates that over five million Americans are exclusively sexually oriented to others of the same sex, while a far larger number of people engage in occasional sexual ac-

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9. *See, e.g.*, Gebhard, "Incidence of Overt Homosexuality in the U.S. and Western Europe," National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers*, DHEW Publication No. 72-9116 (HSM) (Livingood ed. 1972); Gebhard & Johnson, *The Kinsey Data: Marginal Tabulations of the 1938-1963 Interviews Conducted By the Institute for Sex Research* (1979); Hunt, *Sexual Behavior in the Seventies* (1974); Katchadourian & Lunde, *Fundamentals of Human Sexuality* (1975). For the states that have decriminalized private same-sex sexual activity, see note 8.

tivity with others of their sex. Francoeur, *Becoming A Sexual Person* (1982). Some researchers have concluded that the non-exclusive homosexual population includes at least twenty-five million men and women. Paul, "Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument," *Homosexuality* 25-26.

Although it is unknown why some people have a same-sex orientation while others do not, the consensus of expert authority is that sexual orientation has already developed by a very early age, independent of isolated sexual experiences. *See, e.g.*, Bell, Weinberg & Hammersmith, *Sexual Preference: Its Development in Men & Women* (1981); Marmor, ed., *Homosexual Behavior: A Modern Reappraisal* (1980); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972); Karlen, *Sexuality and Homosexuality* 572-606 (1971). Moreover, people who engage in same-sex sexual activity constitute an extremely diverse population, indistinguishable in all other respects from people who do not. *See* Bell & Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 195-231 (1978) (hereafter, *Homosexualities*); Churchill, *Homosexual Behavior Among Males* 36-59 (1967); Tripp, *The Homosexual Matrix* (1975). Like the phenomenon of heterosexual attraction, same-sex orientation is not going to change and is not going to disappear.

Sexual activity between people of the same sex occurs often in a variety of societies around the world. Carrier, "Homosexual Behavior in Cross-Cultural Perspective," *Homosexual Behavior: A Modern Reappraisal* (1980); Ford & Beach, *Patterns of Sexual Behavior* (1951). It has existed throughout the ages. *See, e.g.*, Boswell, *Christianity, Social Tolerance, and Homosexuality* (1980); Bullough, *Homosexuality: A History* (1979). Some cultures have idealized it, others condemned it, others merely tolerated it or remained indifferent. Re-

gardless of the prevailing social attitude, however, same-sex intimacy and people of homosexual orientation have existed as a substantial and ubiquitous part of human affairs.[10]

Same-sex coupling is thus both natural and desirable to many Americans, indeed to many people in most societies in most historical eras.[11] Moreover, same-sex

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10. Contrary to the state's allegations, even in Western society there has been a considerable range of tolerance for homosexual people and sexual activity between people of the same sex. *See, e.g., Boswell,* Chs. 1 and 2; Bullough, *Sexual Variance in Society and History* (1976). Most European nations have either never had laws against same-sex sexual conduct or have repealed them. The Soviet Union and many of its satellites, by contrast, strongly condemn and repress same-sex sexual activity. Katchadourian & Lunde, *Fundamentals of Human Sexuality* 511. At present, the Soviet Union and the United States are the only major countries in Europe and North America still penalizing such conduct. The European Court of Human Rights has declared that the internationally recognized right to privacy protects an adult's freedom to engage in consensual sexual activity with the partner of his or her choice. Eur. Court H.R., Series B, No. 40, *Dudgeon* Case at 40.

11. In its invocation of "traditional" condemnation as a support for its position, the state fails to complete the historical picture. (Brief at 21-22). For example, the original edicts against same-sex sexual activity declared that such behavior was the cause of earthquakes, floods, and plague. *See* Justinian, *Novellae* 77 and 11, reprinted in Bailey, *Homosexuality and the Western Christian Tradition* 73-75 (1955). Blackstone cites Sodom and Gomorrah in support of the death penalty for same-sex sexual acts. 4 *Commentaries* (Beacon Press 1962). Aquinas and Augustine condemned contraception as vehemently as homosexuality. *See, e.g.,* Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1966). Similar attitudes prevailed regarding divorce and heresy. The state's contention that such "traditions" and sources should outweigh American values of freedom and the Constitution's protection of the individual's right to make such choices privately is absurd. Unfortunately, courts still cite to such sources, including references to Sodom, in support of laws such as the Georgia statute. *See, e.g., Dawson v. Vance,* 329 F. Supp. 1320, 1322 (S.D. Tex. 1971); *Doe v. Commonwealth's Attorney,* 403 F. Supp. at 1202. Meaningful, heightened scrutiny is necessary to prevent such unconstitutional acquiescence in irrational state intrusion. *See* discussion in Point II.

sexual activity, including oral and anal contact, does not deviate from any biological norm. Oral and anal sex are themselves biologically natural forms of sexual expression.[12] After a long period of ignorance and resultant hostility, today most mental health professionals no longer consider same-sex orientation and behavior to be a mental disorder.

In 1973, the American Psychiatric Association declared that homosexuality *per se* implies "no impairment in judgment, stability, reliability, or general social or vocational capabilities." The Association concluded that "[i]n the reasoned judgment of most American psychiatrists today, homosexuality *per se* does not constitute any form of mental disease." Resolution of the American Psychiatric Association, December 15, 1973. Two years later, the American Psychological Association and American Public Health Association passed similar resolutions urging the eradication of the myths and prejudice stigmatizing same-sex orientation. Resolution of the Council

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12. Oral and anal sexual contact are statistically extremely common among both heterosexual and same-sex couples. Kinsey's research showed that fifty-four percent of exclusively or predominantly heterosexual men and forty-nine percent of exclusively or predominantly heterosexual women often engage in the sexual conduct prohibited by the Georgia statute. Kinsey, *Sexual Behavior in the Human Female* (1953); Kinsey, *Sexual Behavior in the Human Male* at 368-370. Sixty percent of married, college-educated people frequently engage in oral intercourse. *Id.* More recent research shows that approximately eighty percent of nonmarried men and women between the ages of twenty-five and thirty-four and ninety percent of young married couples engage in oral intercourse. Hunt, *Sexual Behavior in the Seventies* (1974). Twenty-five percent of the subjects under thirty-five years old in one study had engaged in anal intercourse in the year preceding the study. *Id.* Other nationwide research showed that thirty percent of the women interviewed enjoyed anal intercourse. Hite, *The Hite Report: A Nationwide Study on Female Sexuality* 76 (1976). Recent studies have concluded not only that oral and anal sex are pervasively practiced, but that couples which engage in such sexual expression are happier. Blumstein & Schwartz, *American Couples* 231, 240.

of Representatives of the American Psychological Association (1975); Resolution No. 7514 of the American Public Health Association (1975).[13]

Because of the importance of private intimate expression and the futility and destructiveness of criminalization of such adult personal choice, many professional organizations have strongly advocated the repeal of statutes penalizing private sexual conduct between consenting adults. More than thirty years ago, the American Law Institute removed provisions such as Georgia's statute from its Model Penal Code, stating:

> The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences.

Model Penal Code, Art. 207.1 comment (1955).

In addition to the professional associations discussed above, the American Bar Association, American Medical Association, and National Association of Social Workers have all urged the repeal of such intrusive statutes.[14]

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13. The action of these organizations of mental health professionals followed a long process of evaluation and study by a large number of independent researchers. *See, e.g.*, Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Protective Techniques 17-31 (1957); Gonsiorek, *Results of Psychological Testing in Homosexual Populations*, 25 Am. Behav. Scientist 388, 394 (1982); Meredith & Riester, *Psychotherapy, Responsibility and Homosexuality: Clinical Examination of Socially Deviant Behavior*, 11 Professional Psychology 174-193 (1980); Riess, "Psychological Tests in Homosexuality," *Homosexual Behavior: A Modern Reappraisal*.

14. Resolution of the American Bar Association House of Delegates, Summary of Action 23 (Aug. 1973) (The ABA Section of Individual Rights and Responsibilities recommended this

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Many major religious organizations, regardless of their doctrinal position on homosexuality, have also opposed criminalization of private adult sexual choice.[15]

Finally, twenty-five states have eliminated their consensual "sodomy" statutes, most through legislative enactment, a few by judicial action. These states, like the experts and professional and religious groups discussed above, have all recognized that government has no place policing intimate, consensual behavior in the bedrooms of its citizens.

In the American constitutional scheme, choice of private sexual activity and adult partner must be left to the dictates of each individual and the persuasive powers of society, rather than the coercive power of the state. This Court should affirm the holding that the right to privacy

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Resolution, stating that "such laws impinge on the . . . privacy that surrounds each individual and serve no valid state purpose," 4 Human Rights 67 (1974)); Resolution adopted in lieu of Report I by the American Medical Association House of Delegates, Annual Meeting Report 84 (1975). *Cf.* American Sociological Association (ASA), Resolution of ASA Council (Jan. 1978) ("the American Sociological Association affirms its opposition to oppressve action against homosexuals and its commitment to their civil rights"); National Association of Social Workers, NASW Delegate Assembly (1977) ("The Association deplores and will work to combat archaic laws, discriminatory employment practices, and any of the forms of discrimination which serve to impose something less than equal status upon homosexually oriented members of the human family.").

15. These religious groups include the National Federation of Priests Councils (the largest association of Roman Catholic priests in the United States), the Union of American Hebrew Congregations, the United Church of Christ, the Lutheran Church of America, the Methodist General Conference, the Presbyterian Church (USA), the Society of Friends, the Episcopal Church, the American Baptists, the Unitarian-Universalist Church, and the National Council of Churches. Hiltner, "Homosexuality and the Churches," *Homosexuality: A Modern Reappraisel* (1980); Presbyterian Blue Book I & II, Report on the Church and Homosexuality (1978).

embraces such intimate decisions, and should require that the state meet its constitutional obligation either to demonstrate a compelling need for regulation or leave Americans free to make their own choices in life and love.

POINT II

BECAUSE THE RIGHT TO PRIVACY EMBRACES THE INDIVIDUAL'S PRIVATE CHOICE OF SEXUAL ACTIVITY AND ADULT PARTNER, THE STATE MUST SHOW THAT ITS FELONY STATUTE IS WELL-TAILORED AND BASED UPON A COMPELLING AND LEGITIMATE GOVERNMENTAL INTEREST.

"[R]egulations imposing a burden on [the right to privacy] may be justified only by a compelling state interest, and must be narrowly drawn to express only those interests." *Carey v. Population Services International,* 431 U.S. at 686; *Roe v. Wade,* 410 U.S. at 155 ("where certain fundamental rights are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest', . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake"). This Court, like the Eleventh Circuit, should hold Georgia to this well-established constitutional standard.

The state's attempt to interfere in the bedrooms of its citizens and to shape their private sexual choices "slic[es] deeply" into their fundamental right of intimate association. *See Moore,* 431 U.S. at 498. As in *Moore*, "[t]his is no mere incidental result of the ordinance." *Id.* When a person in Georgia privately engages in oral or anal intercourse with a consenting adult, male or female, married or unmarried, he or she faces a prison term of up to twenty years. O.C.G.A. § 16-6-2(a) (1984).[16]

16. Under the statute, the same acts committed forcibly could be punished with a shorter sentence. O.C.G.A. § 16-6-2(a).

The Eleventh Circuit appropriately insisted that the state "demonstrate a compelling interest in restricting" the rights at stake, and "show that the sodomy statute is a properly restrained method of safeguarding its interests." *Hardwick*, 760 F.2d at 1213.

The state's conclusory assertions or mere invocation of buzzwords such as "morality", "decency", or "health" are not sufficient to sustain an assault on protected freedom. Courts have a vital constitutional role to play in applying the appropriate standard before condoning the restriction of individual choice. Strict scrutiny, invoked whenever a fundamental right is trammeled, is particularly necessary to protect the rights of vulnerable individuals or minorities engaged in unpopular, though legitimate, activity.

Same-sex orientation is not itself illegal. *See Robinson v. California*, 370 U.S. 660 (1962). Nevertheless, gay men and lesbians face prejudice, stigma, discrimination, physical violence, and even criminal penalty because of whom they love and their choice to act upon that attraction. Not the least of their burdens is that courts often acquiesce in the deprivation of their equal rights, including their rights to sexual privacy and intimate association. Without clear guidance from this Court, courts and legislatures may continue to give only cursory review to constitutional claims by citizens who happen to be gay. *See, e.g., Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202 (majority opinion circular and conclusory).[17]

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17. In *Doe*, the district court upheld a "sodomy" statute on the tautological theory that violations of it were illegal: "[I]f the state has the burden of proving that it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation. Fundamentally, the state action is simply directed to the suppression of crime, whether committed in public or private." 403 F. Supp. at 1202. This Court must require courts to perform their constitutional tasks meaningfully; in the case of laws penalizing same-sex intimacy, this requires strict scrutiny.

The most striking recent example of a failure to apply strict scrutiny can be found by contrasting the well-reasoned and correct conclusion of the Eleventh Circuit with the cursory decision of the bitterly divided Fifth Circuit in its *en banc* opinion on the Texas "sodomy" statute. *Baker v. Wade*, 769 F.2d 289. The *Hardwick* court analyzed this Court's privacy cases without presumptively excluding gay men and lesbians from their scope. It demanded a real fulfillment of this Court's requirements for state intrusion.

By contrast, the Fifth Circuit offered no independent reasoning in rejecting a similar claim. The court merely asserted a "strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries," suggested without elaboration that it bore some relation to the implementation of "morality", and reversed the district court's findings and holding that the Texas statute is unconstitutional. *Baker*, 769 F.2d at 292.[18]

The Fifth Circuit's conclusory comment regarding social attitudes, and the state's use of a discriminatory misdemeanor statute to promote an undefined and undefended conception of "morality", contrast also with the approach of the *Baker* trial court. In a lengthy and learned opinion following an extensive trial, Judge Buchmeyer concluded that the state had presented no evidence at trial supporting any of its asserted interests, and, indeed, was unable to show even a rational relationship between those interests and the statute. 553 F. Supp. at 1142.[19]

The *Baker* trial court found that, "*under the record in this case, the defendants have nothing to rely* upon but the

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18. Reliance on asserted "tradition" would have kept contraception prohibited in *Griswold*, and segregation intact in *Brown v. Board of Education*, 347 U.S. 483 (1954). The Constitution requires more.

19. The *Baker* district court opinion is notable both for the range of expert testimony it analyzes, and for its accurate and unbiased depiction of a frequently encountered experience of growing up gay in the United States. *See* 553 F. Supp. at 1121.

assertion of general platitudes (morality, decency, etc.)." *Id.* (original emphasis). For example, the only evidence offered in support of the "state's supposed interest in 'public health' [as] furthered by [the statute was] not based upon any independent research [and was] contrary to the medical and psychiatric literature, to the opinions of most American psychiatrists today, and to the very credible evidence given by plaintiff's experts." *Id.* Like all courts which truly required the state to defend an assault on same-sex relations, the district court found the state had not even seriously tried to meet its constitutional obligations.

Strict scrutiny is thus required to give meaningful protection to gay people's exercise of their equal privacy rights. A free nation cannot tolerate unsubstantiated reiteration of myth, insult, fear, and hate as the basis of public policy. *See Palmore v. Sidoti,* 104 S.Ct. at 1882 (prejudice and stereotypes cannot justify denial of protected right); *United States v. Moreno,* 413 U.S. 528, 534-35 (1973) (the "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"); *O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) ("mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty").[20]

One particularly important application of this constitutional principle is highlighted by the suggestion that the Georgia statute serves to promote "morality". (Brief at

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20. Courts have had to play this vigilant role before in regard to unpopular groups. *See, e.g., Bynum v. Schiro,* 219 F. Supp. 204, 209 (E.D. La. 1963), *aff'd,* 375 U.S. 395 (1964) (in support of restriction, city offers only offensive and irrelevant assertions of supposed health threat from black people); *Turner v. Randolph,* 195 F. Supp. 677, 679-80 (W.D. Tenn. 1961). Social prejudice stigmatized Irish immigrants and black people as carriers of disease. *See* Rosenberg, *The Cholera Years* 59-62, 181-83 (1962). That courts must be vigilant on behalf of homosexual people is evidenced by Georgia's willingness (Brief at 37 n.18) to rely on the testimony of Paul Cameron, who was expelled from the American Psychological Association and disclaimed by the American

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34-39). This Court need not resolve this question, for the state has not as yet been required to offer any evidence whatsoever that the statute serves such a function, that it is narrowly drawn, and that the "morality" supposedly furthered by the statute is in fact constitutional. However, this Court should affirm the Eleventh Circuit's insistence that the mere invocation of "traditional morality", without definition or application, cannot alone sustain such significant infringement on important, cherished, private activity.

This Court has repeatedly made clear that "[a] way of life that is odd or even erratic, but interferes with no rights or interests of others, is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972).

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States.

Roe v. Wade, 410 U.S. at 157. As the New York Court of Appeals noted in *Onofre*:

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Sociological Association. *The Advocate*, Issue 432, Oct. 29, 1985, page 28. He has actually called for the extermination of gay people. CNN, "Crossfire", May 1985. The state's assertion of the same myths which seek to link homosexuality with child molestation, health threats, public lewdness, and so on (Brief at 36-37) is as offensive as they are baseless. *See, e.g.*, Gebhard, *Sex Offenders* (1965); Hoffman, *The Gay World* 89-92 (1968); Bell & Weinberg, *Homosexualities* 230; West, *Homosexuality* 119 (1968); Geiser, *Hidden Victims: The Sexual Abuse of Children* 75 (1979). Neither the district court in *Baker*, 553 F. Supp. at 1121, nor the New York Court of Appeals in *Onofre*, 51 N.Y.2d at 476, having reviewed the record and considered actual evidence, found that the state could show the similar statutes in question served any valid interest. The Eleventh Circuit rightly insisted that the state be obliged to prove its claims before invading the privacy of its citizens.

> The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

51 N.Y.2d at 488 n.3. That Court correctly observed that there is "a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have an effect on what is known as public morality." *Id.* at 489-90; *see also Commonwealth v. Bonadio*, 490 Pa. 91 (citing J.S. Mill and constitutional themes of state non-interference with individual private morality); Eur. Court H.R., Series B, No. 40, *Dudgeon Case*. The *Onofre* court found that the state had failed to demonstrate how statutes such as Georgia's "serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the [s]tate." 51 N.Y.2d at 489-90.

In the area of sexual privacy and the choice of a partner of the same sex, this Court should require that the lower courts act "to resolve the issue by constitutional measurement, free of emotion and of predilection," regardless of the "sensitive and emotional nature of the . . . controversy [and] the deep and seemingly absolute convictions that the subject inspires." *Roe v. Wade*, 410 U.S. at 116. The choices of how and with whom to enjoy sexual intimacy and intimate association are of paramount importance to all people. This Court should assure that all are given equal protection of this right to make those private decisions free of overbroad and unjustified government intrusion.

POINT III

STATUTES WHICH CRIMINALIZE PRIVATE CONSENSUAL SEXUAL ACTIVITY HAVE DAMAGING CONSEQUENCES BEYOND THE INVASION OF PRIVACY. SUCH LAWS PROVIDE A BASIS FOR FURTHER, UNJUSTIFIED DISCRIMINATION, INJURE THE PSYCHOLOGICAL WELL-BEING OF MILLIONS OF AMERICANS, AND UNDERMINE RESPECT FOR THE LAW AND LAW ENFORCEMENT.

Efforts to prohibit such common forms of private sexual expression as oral and anal sex, heterosexual as well as homosexual, are invasive and unwarranted. They are also largely unenforceable except in the most offensive and selective fashion.[21] *See, e.g., Baker*, 553 F. Supp. at 1130. The prevalence of such activity does not appear any less in the jurisdictions which forbid them than in those where they have been decriminalized.[22] Although they fail in their primary aim, in other ways, laws such as the Georgia statute wreak great harm on society and on millions of individuals.

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21. Not only are these statutes unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources, in fact, they are rarely enforced. *See, e.g.*, Note, *The Bedroom Should Not Be Within the Province of the Law*, 4 Cal. W.L. Rev. 115, 126 (1968). This suggests that the statutes do not play a major role in implementing whatever legitimate state interests may be asserted. By contrast, the mere existence of the statutes harms individuals and society in numerous unintended and impermissible ways.

22. Similarly, the incidence of homosexuality is no greater in Europe, where it is legal, than in the United States, where, until recently, a majority of states criminalized its expression. Weinberg & Williams, *Male Homosexuals: Their Problems and Adaptations* 83-89 (1974). Moreover, despite the state's unsupported insinuation, there is of course no indication that the decriminalization of private same-sex sexual activity has been accompanied by an increase in "sado-masochistic group orgies, or transvestism," public lewdness, rape, child molestation, or prostitution. (Brief at 36). Furthermore, the statute challenged here deals with private intimacy between adults; any public criminal acts can be and are dealt with by other statutes. The state's reliance on such discredited, offensive, irrelevant, and unsupported charges is one more indication why courts must perform their constitutional function of closely scrutinizing such statutes.

Society and the institutions of law enforcement are injured when the law embarks on a futile and intrusive invasion of citizens' privacy. As one judge has observed:

> I recall sitting as a trial judge . . . and hearing police officers testify how they stood on a box to peer through a bedroom window in a private home to observe two adult males engage in voluntary sex acts. The males appeared to be intelligent, sensitive gentlemen, accepted by the community socially and economically. Yet they were subjected to a felony charge for no evident societal purpose. They were convicted, and I gave them probation. I have often wondered how they survived the humiliating exposure of a felony trial and conviction for their private behavior. And I wondered, too, if these two law enforcement officers could not have more effectively employed their time to serve the community by pursuing thieves and robbers.

Mosk, *The Consenting Adult Homosexual and the Law (Foreward)*, 13 U.C.L.A.L. Rev. 643, 645 (1966). This police intrusion is as offensive as that condemned in *Griswold*,[23] and is the reason why there is increasing acceptance for the view that private sexual activity is just "not the law's business." Report of the Committee on Homosexual Offenses and Prostitution (Wolfenden Report) 24 (1957).

The state's attempt to enforce such statutes degrades both the state and those on whose privacy they intrude. Moreover, the inevitable widespread flouting of such laws breeds contempt for the legal order. Where people feel the state has no lawful business, they will not surrender their most private, most fundamental freedoms. Criminal sanctions will not deter people from having private consensual intercourse with the partner of their choice "because 'sex, next to hunger and thirst is the most powerful drive that human beings experience,' and it is unrealistic to think that

23. In *Griswold*, this Court demanded:
> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy.

381 U.S. at 485-86.

such laws will force total abstinence." *Baker*, 553 F. Supp. at 1130. Historically, such prohibitions have failed and continue to fail, but not without great cost to millions.

By setting gay people apart and proscribing sexual activity in which they engage, these statutes do them great harm. Just as society is rendered less stable when it outlaws such a permanent and often influential subculture, so the individuals involved face numerous hardships and consequences far beyond the criminal proceeding.

Because gay men and lesbians have few legal protections from discrimination based on their sexual orientation,[24] conviction, and even the mere arrest, for same-sex sexual activity can lead to discrimination in employment, housing, and the like.[25] Even where there has been no violation, the mere existence of such laws has been cited as a basis for infringing First Amendment and other rights of gay men and lesbians. *See, e.g., National Gay Task Force v. Bd. of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.*, — U.S. —, 105 S.Ct. 1858 (1985) (state seeks to justify statute limiting right to speak about homosexuality by mere existence of law penalizing same-sex sexual activity).[26] Parents have even been denied custody of their children by courts which find no real harm to the children, but condemn the parents' same-sex relationships and refer to

24. Only one state, Wisconsin, and some forty-nine local jurisdictions explicitly protect the equal civil rights of gay citizens and prohibit discrimination based on sexual orientation or affectional preference.

25. *See* Rivera, *Queer Law: Sexual Orientation in the Mid-Eighties*, Part I, 10 Dayton L. Rev. 459 (1985); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979); Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L. Rev. 311 (1980-81).

26. *See also Gay Activists Alliance v. Bd. of Regents*, 638 P.2d 1116, 1121-22 (Ok. 1981) (lower court upheld refusal by regents to grant organization recognition because of mere existence of

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state statutes prohibiting such sexual activity. *See, e.g., Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).[27]

Indeed, although mere status as a "homosexual" is not criminal, some courts have seized upon criminal laws regarding sexual activity to conclude that having same-sex orientation is to engage in, or at least contemplate, prohibited conduct. *See, e.g., In re N.R.S.*, 403 So. 2d 1315, 1318 (Fla. 1981) (Boyd, J., dissenting) ("Even without evidence of actual conduct, I am opposed to the admission [to the bar] of any person whose admitted 'orientation' indicates a lifestyle likely to involve routine violation of a criminal statute."); *Gay Activists v. Lomenzo*, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971), *rev'd*, 329 N.Y.S.2d 181 (3d Dep't 1972), *aff'd*, 31 N.Y.2d 965 (1973). Similarly, people mistakenly believe that criminal laws such as Georgia's make it illegal to be gay. E.g., Boggan, Haft, Lister, Rupp & Stoddard, *The Rights of Gay People* (1983).

Such stigmatization, both unfair and improper, exacts a great cost from many gay men and lesbians. Frequently treated as deviants and outcasts, they are often forced to develop the coping mechanisms common to most persecuted groups, including ethnic, racial, and religious minor-

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Oklahoma law against homosexual activity); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848, 850 (8th Cir. 1977), *cert. denied sub nom. Ratchford v. Gay Lib*, 434 U.S. 981 (1978) (reversing district court which "ruled that the school officials justified their refusal on the ground that recognition . . . would probably result in the commission of felonious acts of sodomy"); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (existence of penal sanctions given as a "special" reason why advertisement for gay counseling and legal aid not protected by First Amendment); *Gay Students Organization v. Bonner*, 509 F. 2d 652, 662-63 (1st Cir. 1974) (ban on gay social functions invalid despite university's asserted interest in "preventing illegal activity, which may include 'deviate' sex acts [or] 'lascivious carriage' "); *see also Lexington Theological Seminary v. Vance*, 596 S.W.2d 11 (Ky. 1979).

27. *See*, e.g., discussion of other cases of discrimination in Rivera articles listed in footnote 25.

ities. These traits vary with the individual, and can include strong identification with the minority group, independence, and bonding, or, on the other hand, feelings of insecurity, denial of membership in the group, self-hatred, and alienation. Allport, *The Nature of Prejudice* (1954); *see also* Coleman, "Changing Approaches to the Treatment of Homosexuality: A Review," *Homosexuality* 81.

Characterization of an individual as deviant causes others to construe all his or her behavior as manifesting deviance. Gonsiorek, *Social Psychological Concepts in the Understanding of Homosexuality*, 25 Am. Behav. Scientist 483, 485 (1982). Because same-sex sexual activity is labeled "deviant" and prohibited, gay people become stigmatized and are saddled with self-perpetuating, undesirable stereotypes. *Id.* This, in turn, fosters discrimination and thus greater stress, instability, and hardship for the individuals concerned, without even any link to the supposed state interests at stake.

For gay people, sexuality and their sexual orientation play an especially central role in the definition of self, in the identification with others, and in the acceptance of being different from the majoritarian model. Tripp, *The Homosexual Matrix*. It is an aspect of their personality with which they must learn to come to terms in order to get on with their lives. Because of widespread social hostility and ignorance, many face this issue alone, in fear, and even in shame. "The decision to 'come out of the closet' and avow one's homosexual association is certainly a statement of great personal importance and may also be a political act." Karst, 89 Yale L.J. at 654. Laws such as Georgia's

thus impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment.[28]

The Georgia statute denies gay people any opportunity to enter into the intimate one-on-one relationships which nearly all people cherish as at the heart of life's meaning and richness. Gay people are already denied the opportunity to marry and thus "to enter the only relationship in which the State . . . allows sexual relations legally to take place."[29] *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *see also* Karlen, *Sexuality and Homosexuality* 408. Just as non-gay people are assured of strict scrutiny by the courts to protect their right of access to this intimate association, so gay people must be protected against a total barrier to sexual intimacy with a partner of their choosing.

Like all human beings, gay men and lesbians seek and need the solace and enjoyment of intimate association with another. This Court should recognize their constitutional right to privacy in such intimate endeavors, and should draw the line at unjustified and offensive governmental intrusion into the bedrooms and private lives of Americans who seek as people to love and as citizens to be let alone.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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28. The fact that state regulation of same-sex behavior constitutes the total prohibition of an entire way of life distinguishes it from the regulation of public opportunities to view obscenity, a less fundamental interest of the individual. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973). Of course, even viewing obscenity is protected when done in private. *Stanley*, 394 U.S. at 557.

29. The Georgia statute also denies sexual privacy even to married, non-gay couples. For that reason as well, the court below correctly required the state to demonstrate the compelling interest for its sweeping invasion into private lives.

Respectfully submitted,

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